Filed 1/26/16 Ahern v. Asset Management Consultants CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PRISCILLA AHERN et al., Plaintiffs and Appellants, v. ASSET MANAGEMENT CONSULTANTS INC., et al., Defendants and Respondents.	B260829 (Los Angeles County Super. Ct. No. BC484356)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu M. Berle and John Shepard Wiley, Jr. Judges. Reversed and remanded with directions.

Catanzarita Law Corporation, Kenneth J. Catanzarite and Nicole M. Catanzarite-Woodward, and Eric V. Anderton, for Plaintiffs and Appellants.

Jackson, DeMarco, Tidus & Peckenpaugh, M. Alim Malik and Charles M. Clark, for Defendants and Respondents, Asset Management Consultants, Inc., BH & Sons, LLC, Argent Associates, LLC, Argent Real Estate Associates L.P., James Hopper and Gloria Hopper.

Priscilla Ahern, Thomas Ahern, Amlap Ahern, LLC and Michael Stella (collectively Ahern parties) and Asset Management Consultants, Inc., BH & Sons, LLC, Argent Associates, LLC, Argent Real Estate Associates, L.P., James R. Hopper and Gloria Hopper (collectively Hopper parties) were parties to two arbitration proceedings. The Hopper parties prevailed in the first proceeding (the Polsky arbitration), which they had initiated; the award was confirmed by the superior court. The arbitrator in the second proceeding (the Chernick arbitration) then found the Polsky arbitration award barred the Ahern parties' claims under the doctrine of res judicata. The superior court confirmed the Chernick arbitration award and entered judgment in favor of the Hopper parties.

The Ahern parties appealed both judgments. In *Ahern v. Asset Management Consultants, Inc*. (Aug. 11, 2015, B253974 & B257684) (nonpub. opn.) (*Ahern I*) we reversed the judgment entered in conformity with the Polsky arbitration award, finding the superior court had erred in compelling arbitration based on the arbitration provision in an agreement (referred to by the parties and in *Ahern I* as the iStar PSA) that neither established nor governed any relationship between the Ahern and Hopper parties. The matter was remanded with directions to the superior court to vacate its order compelling arbitration, to deny the Hopper parties' petition to confirm the Polsky arbitration award and to grant the Ahern parties' petition to vacate that award.

Because the sole basis for the Chernick arbitration award was the preclusive effect of the Polsky arbitration award, our decision in *Ahern I* reversing the judgment confirming the Polsky arbitration award and directing the superior court to vacate not only that award but also its order compelling arbitration requires that the Chernick arbitration award be vacated as well.[1] In addition, our holding in *Ahern I* that the disputes between the Ahern and Hopper parties were not subject to arbitration under the iStar PSA necessarily means, as the Ahern parties have consistently argued, arbitrator

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[1] Because our decision in *Ahern I* was filed following completion of briefing in this appeal, at our invitation the parties submited supplemental letter briefs addressing the effect of that decision on the appeal.

Chernick lacked jurisdiction to determine their claims. (See Code Civ. Proc., § 1286.2, subd. (a)(4).)

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Two-step Transaction for the La Palma Avenue Property*

In 2006 BH & Sons agreed to purchase commercial real property located at 5515 East La Palma Avenue in Anaheim from iStar CTL I, L.P. When it entered the purchase and sale agreement (the iStar PSA), BH & Sons and Asset Management Consultants,[2] its managing member, intended to sell direct or indirect fractional ownership interests in the property to investors, apparently with contemplated tax benefits for the new purchasers. Investors either formed single purpose limited liability companies, which purchased an interest in the La Palma Avenue property as tenants in common, or became limited partners in Amlap Venture, L.P., which then purchased a tenancy in common interest in the property. Ultimately, Amlap Venture had 39 limited partners and owned a 24.17 percent interest in the property as a tenant in common; 13 newly formed limited liability companies owned remaining portions of the property as tenants in common. The cotenancy was operated and managed by BH & Sons pursuant to the terms of cotenancy agreements signed by each investor.

In September 2006 BH & Sons assigned (sold) its entire interest in the iStar PSA to the cotenancy. Each investor who had purchased a direct tenant-in-common interest signed a purchase and sale agreement that provided BH & Sons was selling the investor's property interest to the investor and assigning and transferring to the investor BH & Sons's rights and remedies under the iStar PSA with respect to the investor's property interest.

2. *The Ahern Parties' Complaint and the Demand for Arbitration*

In a 77-page, 16 cause-of-action putative class action complaint filed May 10, 2012 naming the Hopper parties and other defendants, the Ahern parties alleged they had

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[2] James Hopper and Gloria Hopper are partial owners and employees of Asset Management Consultants.

been fraudulently induced to enter into the La Palma Avenue property transaction through the promotional materials and offering memoranda developed and distributed by BH & Sons and Asset Management Consultants. According to the complaint, Priscilla and Thomas Ahern and Amlap Ahern had purchased a direct tenant-in-common interest for $450,000; and Michael Stella had purchased $40,000 in limited partnership units in Amlap Venture.

In their complaint the Ahern parties alleged, "The transaction was nothing more than a real estate scam put together by the defendants to line their own pockets." According to the complaint, the offering materials falsely represented the purchase price for the property was $34,550,000 including a $1.3 million commission to be paid by iStar to Asset Management Consultants and the Hoppers. "However, the true purchase price was in fact $30,000,000 or less and what was purported to be a commission was an illegal and secret mark-up of the Property purchase price in which the defendants conspired to inflate the price to hide the fact the Property could have been purchased for $30,000,000 or less." iStar was not named as a defendant, but the Ahern parties alleged it had "conspired with the defendants to secretly markup the Property purchase price so the same was inflated by at least $5,000,000 including the bogus $1,300,000 commission."

The Ahern parties additionally alleged the Hopper parties and others had misrepresented the likelihood that Cingular Wireless, the property's then-current tenant, would renew its lease and that a new institutional tenant could be found if Cingular left the premises. Claims were asserted (among others) for breach of fiduciary duty, intentional misrepresentation, fraud by concealment and unfair business practices under Business and Professions Code section 17200 et seq.

The Hopper parties sent a demand for arbitration to the Ahern parties and then petitioned the court to compel arbitration pursuant to the mandatory arbitration provisions in the iStar PSA. The Ahern parties opposed the petition, contending the Hopper parties lacked standing to compel arbitration under the agreement because BH & Sons had assigned all of its rights and interests in the agreement, including the right to compel

arbitration, to the tenant-in-common investors. The Ahern parties also argued the claims in their complaint were outside the scope of the arbitration provision, which was expressly limited to disputes between the seller (iStar) and the buyer (BH & Sons), and did not cover disputes between BH & Sons (and its agents) and investor cotenants.

3. *The September 19, 2012 Order Compelling Arbitration*

Following extended oral argument the superior court granted the petition to compel arbitration filed by the Hopper parties and stayed the lawsuit against the remaining defendants. The court's September 19, 2012 order stated, "The scope of the Arbitration covers all causes of action, factual allegations and issues alleged by Plaintiffs [the Ahern parties], on behalf of themselves and all others similarly situated, (collectively 'Plaintiffs') against the Petitioners [the Hopper parties]."

4. *Dismissal of the Claims Against the Hopper Defendants*

Following the court's order the Ahern parties elected not to pursue their claims against the Hopper parties and instead to continue with their lawsuit against the remaining defendants. Accordingly, on October 9, 2012 the Ahern parties filed separate requests for a voluntary dismissal without prejudice of their action against each of the six Hopper parties; the dismissals were entered by the clerk on the same date. On January 3, 2013, pursuant to a stipulation between the Ahern parties and the remaining non-Hopper parties, the court dismissed the complaint's class allegations without prejudice; the Ahern parties were permitted to proceed individually.

5. *The Polsky Arbitration Proceedings*

Notwithstanding the October 9, 2012 dismissals, in late October 2012 the Hopper parties prepared and served a demand for arbitration with the alternative dispute resolution provider JAMS, citing as the arbitration agreement the "September 19, 2012 Court Order compelling arbitration pursuant to paragraph 12.20 and Exhibit H of the Purchase and Sale Agreement Between iStar CTL, L.P., As Seller, and BH & Sons, LLC, as Purchaser." The Hopper parties described their claims and relief sought in the following language: "The Hopper Defendants request that Respondents' Requests for

Dismissal, without prejudice, be ordered as dismissed with prejudice. The Hopper Defendants further request damages according to proof at the arbitration for affirmative claims they may assert."

On November 8, 2012 JAMS sent the Hopper parties and the Ahern parties a notice of commencement of arbitration and appointment of Alexander S. Polsky as the arbitrator. The Ahern parties objected to the arbitration and sought to terminate it on the ground they had previously dismissed the claims that the superior court ordered to arbitration. The arbitrator denied the motion to dismiss, concluding his jurisdiction pursuant to the iStar PSA and the September 19, 2012 order "remains intact." In denying the Ahern parties' attempt to dismiss the arbitration, arbitrator Polsky interpreted the September 19, 2012 order regarding the scope of the arbitration to include "all issues and factual allegations relating to the causes of action asserted." Accordingly, the arbitrator ruled he had jurisdiction to determine the Hopper parties' affirmative claims "wholly relating to the factual allegations and issues set forth in the original complaint, including, but not limited to declaratory relief and indemnification."

On February 8, 2013 the Hopper parties served an arbitration complaint seeking contractual indemnity from the Aherns under their tenant-in-common purchase and sale agreement, from Stella under the subscription agreement for Amlap Venture and the limited partnership agreement, and from Amlap Ahern under the cotenancy agreements. The Hopper parties also sought declaratory relief with respect to various aspects of the dispute between the Ahern parties and the Hopper parties as originally pleaded in the Ahern parties' lawsuit. In particular the Hopper parties sought a determination whether they had orchestrated a fraudulent scheme to induce the Ahern parties to purchase fractional interests in the La Palma Avenue property so the Hopper parties could earn a secret profit.

Following several unsuccessful attempts by the Ahern parties to stay the arbitration proceedings, the arbitration hearing was set for September 12, 2013.

6. *The Ahern Parties' Arbitration Complaint*

On September 5, 2013, shortly before the Polsky arbitration hearing date, the Ahern parties filed a demand for arbitration with JAMS together with a "reservation and non-waiver of rights" form, which stated "[the Ahern parties] do not voluntarily submit to JAMS jurisdiction on any matter but instead initiate arbitration pursuant to an order issued by the Los Angeles County Superior Court on September 19, 2012 compelling them to arbitrate their claims against [the Hopper parties] which although previously dismissed without prejudice are raised here. Initiation of arbitration is not a waiver of [the Ahern parties'] rights to object in the trial court as to validity of the order compelling arbitration, validity of an agreement to arbitrate, defenses to arbitration, arbitrability and related matters concerning the ability of [the Hopper parties] to compel arbitration . . . ." The demand identified the dispute as the Ahern parties' "claims against [the Hopper parties] appearing in the Complaint attached hereto as Exhibit '2,'" which was the Ahern parties' original May 10, 2012 complaint.

The Ahern parties then asked JAMS to consolidate the two related arbitration demands. The request was denied by arbitrator Polsky. Richard S. Chernick was subsequently appointed as arbitrator for the instant arbitration proceedings.

7. *The Polsky Arbitration Award*

The Ahern parties did not participate in the Polsky arbitration hearing, maintaining their objection that there was no valid arbitration agreement between them and the Hopper parties and the arbitrator thus lacked jurisdiction over them. Accordingly, the arbitrator proceeded in their absence as permitted under JAMS rules.

On September 17, 2013 arbitrator Polsky issued his award. Based on the evidence presented by the Hopper parties, the arbitrator found no merit to the Ahern parties' complaint against the Hopper parties and, to the contrary, concluded their complaint arose from a breach of their representations and warranties that they were sophisticated investors, had reviewed and understood the various offering and purchase materials, including the descriptions of risk involved in the investment in the La Palma Avenue

property, and would conduct an independent investigation of facts determined to be material to their investment decision. As a result, the Ahern parties were found liable to the Hopper parties for contractual indemnity in various specified amounts.

The Hopper parties petitioned the superior court to confirm the arbitration award; the Ahern parties responded to the petition and cross-petitioned to vacate the award. The superior court confirmed the award and denied the petition to vacate. Judgment was entered in favor of the Hopper parties in accordance with the arbitration award on December 12, 2013. The Ahern parties filed a timely notice of appeal.

8. *The Chernick Arbitration Ruling*

On August 21, 2014, while the appeal from the judgment confirming the Polsky arbitration award was pending in this court, arbitrator Chernick granted a dispositive motion filed by the Hopper parties,[3] concluding that the Ahern parties' claims were barred by the doctrine of res judicata. Quoting *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755 (*Thibodeau*) that "arbitrating parties are obligated . . . to place before their arbitrator all matters within the scope of the arbitration, related to the subject matter, and relevant to the issues," the arbitrator ruled "the Ahern Parties' failure to participate in the [Polsky] arbitration bars their claims in this arbitration [the Chernick arbitration] to the extent the [September 19, 2012] Order of Judge Wiley obligated their participation in the earlier arbitration. As noted above, the claims advanced by the Ahern Parties are identical in both cases."[4]

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[3] The Hopper parties filed their motion one week after the superior court confirmed the Polsky arbitration award (prior to the entry of judgment). The motion was opposed by the Ahern parties; and the arbitrator conducted a hearing on the issue on December 23, 2013.

[4] Arbitrator Chernick rejected the Ahern parties' argument their belated arbitration demand and request for consolidation was, in effect, the assertion of their claims in the Polsky arbitration. He explained, "[T]hey had resisted, opposed and sought to delay the earlier-filed arbitration for almost a year in the arbitration itself and in court on several occasions in several different ways. The time of the later filing and request for consolidation was undoubtedly taken by Polsky as one last effort to delay or abort the

The Hopper parties filed a petition to confirm arbitrator Chernick's award in the superior court action initiated by the Ahern parties in which the September 19, 2012 order compelling arbitration had been entered. (See Code Civ. Proc., § 1292.6.)[5] The Ahern parties asked the court to vacate the award, arguing once again their claims against the Hopper parties were not subject to arbitration and the pendency of their appeal in *Ahern I* precluded an order confirming the award. Following oral argument on October 15, 2014, the superior court granted the petition to confirm the award. The court rejected the Ahern parties' argument the arbitrator lacked jurisdiction, characterizing it as an improper motion for reconsideration of the September 19, 2012 order compelling arbitration, which the court emphasized it had previously ruled when the Ahern parties presented the contention in connection with the Hopper parties' petition to confirm the first arbitration award. With respect to the issue of res judicata and the fact the appeal from the judgment confirming the first arbitration award was pending in this court, the superior court suggested, "If the plaintiffs [(the Ahern parties)] believe that the arbitrator's ruling is incorrect on res judicata [grounds] in the second arbitration award, and do not agree with this court's ruling on the petition to confirm the second arbitration award, plaintiffs can appeal today's ruling. And if they so desire, they can consolidate both appeals." Judgment was entered in conformity with the arbitration award on November 4, 2014. The Ahern parties filed a timely notice of appeal.

9. *Postjudgment Developments: Ahern I*

On August 11, 2015 in *Ahern I* we reversed the judgment entered in conformity with the Polsky arbitration award, finding the superior court had erred in compelling

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arbitration hearing, then less than one week away. . . . It is not possible to conclude that the Ahern Parties actually sought to assert their claims in [the Polsky arbitration], as ordered by Judge Wiley."

[5] Code of Civil Procedure section 1292.6 provides, "After a petition has been filed under this title, the court in which the petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition shall be filed in the same proceeding."

arbitration and thereafter confirming the arbitration award against the Ahern parties based on the arbitration provision in the real estate purchase and sale agreement between iStar and BH & Sons. We explained that agreement neither established nor governed any relationship between the Ahern and Hopper parties. Accordingly, the matter was remanded with directions to the superior court to vacate its September 19, 2012 order compelling arbitration, to deny the Hopper parties' petition to confirm the Polsky arbitration award and to grant the Ahern parties' petition to vacate that award.[6]

DISCUSSION

1. *The Vacated Award from the Polsky Arbitration Has No Res Judicata Effect*

A civil judgment under California law is not final for res judicata purposes until an appeal from the trial court judgment has been exhausted or the time to appeal has expired. (*National Union Fire Ins Co. v. Stites Prof. Law Corp*. (1991) 235 Cal.App.3d 1718, 1726 ["[t]he doctrines of res judicata and collateral estoppel apply only when a final judgment on the merits has been rendered. [Citations.] When, as here, a judgment is still open to direct attack by appeal or otherwise, it is not final and the doctrines of res judicata and collateral estoppel do not apply"]; see *Producers Dairy Delivery Co. v. Sentry Ins. Co*. (1986) 41 Cal.3d 903, 911; *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174; see also *Abelson v. National Union Fire Ins Co*. (1994) 28 Cal.App.4th 776, 787 ["according to California law, a judgment is not final for purposes of collateral estoppel while open to direct attack, e.g., by appeal"].)

Relying on language from *Thibodeau*, *supra*, 4 Cal.App.4th 749, arbitrator Chernick concluded the rule for arbitration awards is different and gave res judicata effect to arbitrator Polsky's award even though the superior court judgment entered in conformity with that award was pending on direct appeal in this court. In particular,

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[6] Our unpublished opinion in *Ahern I*, determining the issue of arbitrability of the disputes between the Ahern and Hopper parties as set forth in Los Angeles Superior Court case No. BC484356, is properly cited and relied upon as establishing the law of the case for resolution of the related issues presented by further proceedings in that same superior court action. (Cal. Rules of Court, rule 8.1115(b)(2).)

Chernick quoted and emphasized the *Thibodeau* court's statement that "in several cases, the courts have viewed an unconfirmed arbitration award as the equivalent of a final judgment." (*Thibodeau*, at p. 759.) The superior court agreed, explaining that "the second arbitration award may be based on res judicata of the first," even though the court acknowledged the Ahern parties' appeal of its judgment confirming the first award was pending in this court.

We have serious doubt whether the doctrine of res judicata barred the Ahern parties from raising in the Chernick arbitration claims that could have been litigated in the Polsky arbitration even though an appeal of the judgment confirming the Polsky award, which argued the arbitrator lacked jurisdiction to hear the disputes, was pending in this court. The issue in *Thibodeau, supra,* 4 Cal.App.4th 749, as well as the several cases it discussed, was the significance of a final arbitration award that was not subject to a petition to confirm or vacate. The party opposing application of res judicata in *Thibodeau* had relied on Code of Civil Procedure section 1287.6, which provides, "An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration," and argued a "contract in writing" is not the same as a final judgment. It was in this specific context that the *Thibodeau* court evaluated the applicability of res judicata and quoted from *Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 822-823, explaining an arbitration award "'is, nevertheless, the final and binding decision or judgment of the arbitrator in the exercise of his quasi-judicial function . . . . It is a recognized principle that an arbitration award is conclusive on matters of fact and law." (*Thibodeau*, at p. 759.)[7] Similarly, in *Lehto v. Underground Constr. Co*. (1977) 69 Cal.App.3d 933, which the *Thibodeau* court also quoted and in

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[7] *Trollope v. Jeffries, supra*, 55 Cal.App.3d 816 did not involve a question of res judicata, but whether accepting the benefits of an arbitration award waived that party's right to appeal the award, as is the general rule with a civil judgment. The appellate court held it did and dismissed the appeal. (*Id.* at p. 824 ["we conclude that the principles governing acceptance of the benefits of a judgment, order or decree apply with equal force to an arbitration award"].)

which the court observed, "[o]nce a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter res judicata" (*Lehto*, at p. 939), the party opposing the binding effect of the arbitrator's award had not sought to vacate that award in the superior court. (*Id*. at p. 940.)[8]

To be sure, the *Thibodeau* court went on to state it was not "troubled" in giving res judicata effect to the arbitrator's award by the pendency of a petition to correct the arbitration award. (*Thibodeau, supra*, 4 Cal.App.4th at p. 761.) But the reason given was that the pending petition did not go to the merits of the award, unlike the situation here: "The petition concerns only the arbitrator's reluctant determination that Eller was the prevailing party and was, therefore, entitled to an award of attorney fees. An eventual decision on the petition to correct will not otherwise affect the substance of the arbitration award." (*Ibid.*) The implication, of course, is that if the petition to correct could have affected the substance of the arbitration award, its pendency would have precluded giving res judicata effect to the arbitrator's decision.

We need not resolve this question, however, because whatever res judicata effect the Polsky arbitration award and the superior court judgment confirming it might have had while the appeal in *Ahern I* was pending, once we reversed the judgment and directed the superior court to vacate the award, it had no preclusive effect whatsoever. "The effect of an unqualified reversal is to vacate the judgment and leave the case 'at large' for further proceedings, including retrial, as if it had never been tried and no judgment had been entered." (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1237-1238; accord, *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa*

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[8] The issue in *Lehto v. Underground Constr. Co., supra*, 69 Cal.App.3d 933 was whether an individual could maintain a separate superior court action against his former employers and his union raising claims related to the issues in an arbitration in which he asserted the union had breached its duty of fair representation. The employers argued the sole remedy was a petition to vacate or correct the arbitration award. The court of appeal disagreed, concluding the employee's substantive rights under federal labor law precluded application of the usual principles governing arbitrations. (*Id.* at pp. 936-937.)

(2011) 198 Cal.App.4th 939, 944, fn. 4 ["[w]e need not resolve the previously described issue of whether the dismissal of an appeal as moot renders the underlying judgment final for purposes of res judicata or collateral estoppel, because reversal of the judgment ensures that it does not"]; see *Regents of University of California v. Public Employment Relations Bd.* (1990) 220 Cal.App.3d 346, 356-357 [explaining prior agency decisions can have no res judicata or collateral estoppel effect if they are reversed; "'[t]he effect of an unqualified reversal ("The judgment is reversed") is to *vacate* the judgment, and to leave the case "at large" for further proceedings as if it had never been tried'"].)

Indeed, arbitrator Chernick appeared to recognize this possible outcome; for his ruling specifically limited its reach, stating only that the Ahern parties' failure to participate in the Polsky arbitration "bars their claims in this arbitration . . . to the extent the Order of Judge Wiley obligated their participation in the earlier arbitration." *Ahern I* directed the superior court to vacate its September 19, 2012 order (the order of Judge Wiley), which improperly compelled the Ahern parties to arbitrate their disputes with the Hopper parties. The Ahern parties were not obligated to participate in the earlier arbitration, and their failure to do so can have no adverse consequences at all.

The Hopper parties complain it would be unfair to reverse the judgment confirming the Chernick arbitration award and thereby leave the Ahern parties with claims pending in arbitration pursuant to an arbitration order this court previously reversed. The Hopper parties misperceive the consequences of our decision: As the Ahern parties have insisted all along, their dispute with the Hopper parties is not within the ambit of the arbitration provision in the iStar PSA; and the superior court erred in ordering the Ahern parties' dispute with the Hopper parties to arbitration. Our remittitur will simply direct the superior court to reverse its judgment, deny the petition to confirm the Chernick arbitration award and grant the petition to vacate it. No rehearing in arbitration or new arbitration proceeding will be ordered. Whether the Ahern parties can still pursue their claims in another forum is not at issue in this appeal.

2. *Arbitrator Chernick Lacked Jurisdiction To Determine the Disputes Between the Ahern and Hopper Parties*

We held in *Ahern I* that the disputes between the Ahern and Hopper parties—the claims asserted by the Ahern parties in their complaint and the affirmative claims brought by the Hopper parties in the Polsky arbitration proceeding—were not subject to arbitration under the arbitration provisions in the iStar PSA, the basis for the superior court's September 19, 2012 order compelling arbitration. That holding is dispositive in this appeal, as well, under the law-of-the-case doctrine. (See *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1291 ["[l]ike res judicata, the doctrine of the law of the case serves to promote finality of litigation by preventing a party from relitigating questions previously decided by a reviewing court"].) Accordingly, arbitrator Chernick lacked jurisdiction to conduct the arbitration proceedings, and the judgment entered in conformity with his award must be reversed. (Code Civ. Proc., § 1286.2, subd. (4).)

Although recognizing the significance of our holding in *Ahern I*, the Hopper parties contend the Ahern parties waived any argument arbitrator Chernick lacked jurisdiction to determine the matter when they demanded arbitration of their affirmative claims on September 5, 2013. That argument reflects a fundamental misunderstanding of the timing and scope of appellate review of an order compelling arbitration.

From the outset the Ahern parties consistently asserted their causes of action for fraud, breach of fiduciary duty and unfair business practices against the Hopper parties were not subject to the mandatory arbitration provisions in the iStar PSA and the arbitrators (both Polsky and Chernick) lacked any jurisdiction to determine those claims. Just as consistently, once the superior court entered its original order compelling arbitration on September 19, 2012, that court refused to reconsider the question of arbitrability, explaining the Ahern parties' proper recourse was to present that issue to this court. Appellate review of the September 19, 2012 order compelling arbitration, however, had to await completion of the arbitration proceedings: An order compelling arbitration is not immediately appealable (*Garcia v. Superior Court* (2015)

236 Cal.App.4th 1138, 1149; *Muao v. Grosvenor Properties, Ltd*. (2002) 99 Cal.App.4th 1085, 1088-1089; see Code Civ. Proc., § 1294), but is reviewable on appeal from the judgment entered following an arbitration award. (*Ashburn v. AIG Financial Advisors, Inc*. (2015) 234 Cal.App.4th 79, 94; *Abramson v. Juniper Networks, Inc*. (2004) 115 Cal.App.4th 638, 648; see Code Civ. Proc., § 1294.2.)

Although the Ahern parties ultimately filed a belated demand for arbitration, they did so based entirely on the September 19, 2012 order compelling arbitration, with an express reservation of their argument that the order compelling arbitration was not valid. Neither the demand for arbitration nor participation in the Chernick arbitration proceedings forfeited the Ahern parties' right to challenge on appeal the validity of the September 19, 2012 order compelling arbitration. To conclude otherwise would make the postjudgment right to appeal the validity of the order compelling arbitration a nullity. (*Peleg v. Neiman Marcus Group, Inc*. (2012) 204 Cal.App.4th 1425, 1437-1438 ["'[a] party does not waive his right to attack the order [compelling arbitration] by proceeding to arbitration; the order is reviewable on appeal from a judgment confirming the award,'" quoting *United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1581-1582.]; accord, *Serafin v. Balco Properties, Ltd., LLC* (2015) 235 Cal.App.4th 165, 172, fn. 3.)

Our unequivocal rejection of the Hopper parties' waiver argument is not in any way undermined by the Hopper parties' quotation from the Ahern parties' reply brief in *Ahern I* where, in response to the Hopper parties' argument they had forfeited their right to challenge the Polsky arbitration award by withdrawing from those arbitration proceedings, the Ahern parties stated: "The Arbitration Award acknowledges Appellants' jurisdictional objection and refusal to participate based thereon. [Citation.] Since Appellants did not participate in the arbitration, they did not waive their right to contest the arbitrator's jurisdiction. [Citations.] Indeed, had Appellants participated in

the arbitration they would have waived their objection. . . ."[9] As we have just explained, the purported general statement of the law in the final sentence, which the Hopper parties quote and emphasize in bold type, is incorrect; and the case cited by the Ahern parties for this proposition, *Kemper v. Schardt* (1983) 143 Cal.App.3d 557, involved a party who had voluntarily participated in arbitration (that is, there was no order compelling the arbitration) and who only challenged the validity of the arbitration agreement after the arbitrator ruled against him and an award had been entered. In that limited context the court held the appellant had "in effect submitted to the arbitrator's authority" by participating in the arbitration proceeding. (*Id*. at p. 560.) In sum, neither the Ahern parties' conditional participation in the Chernick arbitration nor their somewhat imprecise citation of *Kemper* in *Ahern I* constitutes a waiver of their jurisdictional objection to any arbitration of their dispute with the Hopper parties.

DISPOSITION

The judgment confirming the arbitration award is reversed. The matter is remanded with direction to deny the petition to confirm the arbitration award and to grant the Ahern parties' request to vacate the arbitration award. The Ahern parties are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.

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[9] We deny the Hopper parties' motion to take judicial notice of this reply brief, as well as the Ahern parties' conditional motion for judicial notice of their opening brief in *Ahern I*, as unnecessary. (See *Summit Media, LLC v. City of Los Angeles* (2015) 240 Cal.App.4th 171, 180, fn. 2 [unnecessary to take judicial notice of brief or oral argument from earlier appeal in case].)